

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

STEVEN DOUGLAS FURTWANGLER,

Appellant.

No. 38189-3-II

UNPUBLISHED OPINION

Quinn-Brintnall, J. — Steven Douglas Furtwangler appeals his conviction for failing to register as a sex offender. RCW 9A.44.130. Furtwangler challenges the sufficiency of the evidence supporting the trial court’s findings of fact and conclusions of law and argues that, by deferring to the Department of Corrections the responsibility for adjusting his sentence to ensure that his total time in custody and on supervised release does not exceed the statutory maximum, the lower court improperly imposed an unauthorized indeterminate sentence in violation of former RCW 9.94A.505 (2006). We agree with Furtwangler that because the evidence does not show that he had moved to a new residence and does show that he continued to stay at his registered address, the State failed to prove beyond a reasonable doubt that Furtwangler knowingly violated RCW 9A.44.130. Accordingly, we reverse and dismiss.

Facts

On February 22, 2008, the State charged Furtwangler with one count of failure to register as a sex offender as follows:

That [Furtwangler], in the State of Washington, on or about the 27th day of September, 2007, did unlawfully, feloniously, and knowingly fail to comply with the registration requirements of RCW 9A.44.130 when required to do so, having been convicted of a felony sex offense, a kidnapping offense as defined in RCW 9A.44.130, or an equivalent out-of-state or federal offense; defendant failed to comply by either failing to reside at the registered address or by failing to comply with notification requirements regarding a change of address, contrary to RCW 9A.44.130, and against the peace and dignity of the State of Washington.

Clerk's Papers (CP) at 1.

The circumstances underlying the filing of this charge are unusual. In short, Furtwangler was living with his girl friend, Tina, and her parents in the parents' home on South Alder Street in Tacoma, Washington. Because he was a level one sex offender, Furtwangler was required to register his residence address with the Pierce County Sheriff's office. RCW 9A.44.130.<sup>1</sup> On July

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<sup>1</sup> RCW 9A.44.130 states in pertinent part:

(5)(a) If any person required to register pursuant to this section changes his or her residence address within the same county, the person must send signed written notice of the change of address to the county sheriff within seventy-two hours of moving. If any person required to register pursuant to this section moves to a new county, the person must send signed written notice of the change of address at least fourteen days before moving to the county sheriff in the new county of residence and must register with that county sheriff within twenty-four hours of moving. The person must also send signed written notice within ten days of the change of address in the new county to the county sheriff with whom the person last registered. The county sheriff with whom the person last registered shall promptly forward the information concerning the change of address to the county sheriff for the county of the person's new residence. Upon receipt of notice of change of address to a new state, the county sheriff shall promptly forward the information regarding the change of address to the agency designated by the new state as the state's offender registration agency.

(b) It is an affirmative defense to a charge that the person failed to send a notice at least fourteen days in advance of moving as required under (a) of this subsection that the person did not know the location of his or her new residence at

7, 2004, Furtwangler registered with the Pierce County Sheriff's Department listing the correct South Alder Street address where he was living at that time.

In October 2006, following an altercation between Furtwangler and Tina's parents, Tina's mother obtained a protection order that restricted Furtwangler from living in the home. Furtwangler did not honor the protection order and Tina's parents did not enforce it.

Although they told Furtwangler that he must find another place to live, Furtwangler was allowed to continue receiving mail at the Alder Street address, store his personal belongings at the

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least fourteen days before moving. The defendant must establish the defense by a preponderance of the evidence and, to prevail on the defense, must also prove by a preponderance that the defendant sent the required notice within twenty-four hours of determining the new address.

(6)(a) Any person required to register under this section who lacks a fixed residence shall provide signed written notice to the sheriff of the county where he or she last registered within forty-eight hours excluding weekends and holidays after ceasing to have a fixed residence. The notice shall include the information required by subsection (3)(b) of this section, except the photograph and fingerprints. The county sheriff may, for reasonable cause, require the offender to provide a photograph and fingerprints. The sheriff shall forward this information to the sheriff of the county in which the person intends to reside, if the person intends to reside in another county.

(b) A person who lacks a fixed residence must report weekly, in person, to the sheriff of the county where he or she is registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. The county sheriff's office may require the person to list the locations where the person has stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

(c) If any person required to register pursuant to this section does not have a fixed residence, it is an affirmative defense to the charge of failure to register, that he or she provided written notice to the sheriff of the county where he or she last registered within forty-eight hours excluding weekends and holidays after ceasing to have a fixed residence and has subsequently complied with the requirements of subsections (4)(a)(vii) or (viii) and (6) of this section. To prevail, the person must prove the defense by a preponderance of the evidence.

house, and come to the enclosed porch to get clean clothes and food which Tina would prepare. Furtwangler went to the house daily to spend time with Tina, pick up his mail (which Tina's mother collected for him), and eat his meals with Tina in the enclosed mud room at the rear of the home. In addition, Tina's parents allowed Furtwangler to use a family's computer to facilitate his search for further education, employment, and new housing. The computer was located in the property's mother-in-law apartment where Tina's grandmother lived.

In October 2007, Furtwangler told Tina's mother that once the restraining order expired, he would be moving back into the house. She told him, "no more." 1 Report of Proceedings at 10.<sup>2</sup>

Following a one-day bench trial, the court entered the following findings of fact:

#### I. FINDINGS OF FACT

1. Office Assistant GayLynn Wilke and Community Service Officer Sandi Estep of the Pierce County Sheriff's Department and Lonnie Lawrence testified on behalf of the State. The defendant testified on his own behalf.
2. Sandi Estep testified that she is a Community Service Officer for the Pierce County Sheriff's Department, and that most of her job responsibility deals with registering sex offenders.
3. Ms. Estep testified about the process which sex offenders must go through when they register, including the documentation and the physical location where an offender must register.
4. Ms. Estep testified that offenders must come to the County-City Building in Tacoma, WA, to fill out their registration paperwork.
5. GayLynn Wilke testified that she is the records custodian for the Sex/Kidnap Offender Registration Unit of the Pierce County Sheriff's Department.
6. Ms. Wilke testified that Exhibits #1 and #3 were true and accurate copies of the records she maintains as part of her duties.
7. Exhibits #1 and #3 are various registration documents filled out and signed by the defendant over a course of approximately three years indicating where he lived during that time frame.
8. Exhibits #1 and #3 were all admitted at trial after the appropriate

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<sup>2</sup> The charging documents alleged that the violation occurred on or about September 27, 2007.

foundation was laid.

9. The defendant testified that he knew he was required to register as a sex offender.
10. The defendant stipulated that he had been convicted of an offense that required him to register as a sex offender.
11. Lonnie Lawrence lived at 6210 S. Alder St. in Tacoma, WA.
12. On 7/7/04, and again on 5/29/07, the defendant registered with the Pierce County Sheriff's Department. On both dates the defendant listed 6210 S. Alder St. in Tacoma, WA, as his address.
13. Ms. Lawrence testified that the defendant was dating her daughter and for a time lived with them at 6210 S. Alder St.
14. During October of 2006, Ms. Lawrence kicked the defendant out of her home after there was an altercation.
15. When Ms. Lawrence kicked the defendant out of her house, she obtained a protection order that restricted the defendant from living at 6210 S. Alder St.
16. After these events, the defendant still came over to 6210 S. Alder St. to do laundry, eat meals, and hang out with his girlfriend, Ms. Lawrence's daughter.
17. Even though the defendant continued to come over to 6210 S. Alder St., he was not permitted inside the house, and was not permitted to live at that location, except, the defendant was permitted in the mud room/rear porch of the residence, where he ate his meals, visited his girlfriend, and took naps during the daytime hours.
18. Ms. Lawrence testified that when people called her phone number looking for the defendant, she told them that her number was not the defendant's message phone.
19. Ms. Lawrence testified that the defendant had clothing, his video game system, and food in her house after he was no longer permitted by her to live there.
20. The defendant's food was stored in a separate cupboard, and that at times she had taken the defendant with her and her daughter when they went shopping for food.
21. The defendant testified that he continued to keep his clothes and food at 6210 S. Alder St. after he was told by Ms. Lawrence that he was no longer welcome to live there.
22. The defendant testified that he visited 6210 S. Alder St. every day, and slept there during the day.
23. The defendant testified that all of his possessions were at 6210 S. Alder St., that he received mail at that location, that he gave that address to his friends and family to contact him, that he used a computer there to access the internet, and that he used the phone number at that location as a contact number.

24. The defendant testified that he had his dogs at 6210 S. Alder St., and that he never intended to change his registration.
25. The defendant testified that he typically went out at night and was not at 6210 S. Alder St. during the evening hours.
26. The court finds that . . . the defendant used the house at 6210 S. Alder St. to change clothes, eat, and take a shower, not to live there.
27. The court finds that once Ms. Lawrence told the defendant that he was no longer welcome to live at 6210 S. Alder St., he was effectively a transient.

CP at 18-21.

Furtwangler stipulated to being a convicted sex offender subject to registration requirements, and it is undisputed that the acts occurred in the State of Washington. The trial court also entered conclusion of law number 3, on which Furtwangler's conviction rests. It reads as follows:

That [Furtwangler] is guilty beyond a reasonable doubt of the crime of Failure to Register as a sex offender, in that, on or about the 27th day of September, 2007, [Furtwangler]:

- A. had previously been convicted of a felony offense that required him to register as a sex offender;
- B. (1) knowingly failed to comply with the requirement of sex offender registration that the defendant send written notices of a change of address to the county sheriff within seventy two hours of moving to a new residence within the same county; or  
(2) knowingly failed to comply with the requirement that the defendant who had a fixed residence, send a signed written notice of where the defendant plans to stay to the sheriff of the county where the defendant last registered within forty-eight hours, excluding weekends and holidays, of ceasing to have a fixed residence; and
- C. the acts occurred in the State of Washington.

CP at 21-22.

The trial court imposed a sentence of 33 months for what it characterized as a technical violation.

On appeal, Furtwangler challenges the sufficiency of the State's evidence and assigns error to the trial court's findings of fact numbers 26 and 27 and conclusion of law number 3.

#### Discussion

The standards of review in a challenge to the sufficiency of the evidence are well known. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Unchallenged findings of fact are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994).

A transient convicted sex offender, one who lacks a "fixed residence," is required to provide written notice to the sheriff of the county where he last registered within 48 hours of losing said residence and must report weekly, in person, to the sheriff of the county where he is registered. RCW 9A.44.130(6)(a), (b). The State presented no evidence regarding whether Furtwangler personally reported to the sheriff's office each week,<sup>3</sup> and Furtwangler argues that because he continued to reside at the South Alder address (albeit on a limited basis in the mud room), the evidence was insufficient to prove that he was transient and subject to the personal

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<sup>3</sup> Through Wilke's testimony, the State admitted two sex offender registration records, exhibit 1, dated July 7, 2004, and exhibit 3, dated May 29, 2007; neither exhibit addresses Furtwangler's compliance with the personal reporting requirement. Although exhibit 1 names Furtwangler's probation, parole, or community corrections officer in 2004, it lists none in 2007.

weekly reporting requirements of RCW 9A.44.130(6). We agree with Furtwangler.

First, we point out that the record contains no evidence that Furtwangler had moved to a new residence within Pierce County and had failed to register this new address within 72 hours as required under RCW 9A.44.130(5)(a). Accordingly, insufficient evidence supports the trial court's conclusion of law number 3B(1), and Furtwangler's conviction cannot rest on this ground. Thus, to sustain the charge, the State was required to prove beyond a reasonable doubt that Furtwangler violated RCW 9A.44.130 when he ceased to have a fixed residence and became transient and subject to the requirements of RCW 9A.44.130(6). We agree with Furtwangler that the evidence in the record before us is insufficient to support a finding that Furtwangler was transient or to support the trial court's conclusion of law number 3B(2).

In applying the required evidentiary sufficiency standards to the record on appeal, we view the evidence in the light most favorable to the State. *Salinas*, 119 Wn.2d at 201. But where, as here, a criminal statute fails to define a pivotal phrase, "fixed residence," absent clear legislative intention to the contrary, the rule of lenity requires that we also interpret the ambiguous statutory phrase in Furtwangler's favor. *State v. Stratton*, 130 Wn. App. 760, 764-65, 124 P.3d 660 (2005).

This is not the first time this court has addressed the sufficiency of the evidence of a defendant's transience. In *Stratton*, we held that the statute's term "fixed residence" was ambiguous because it could refer either to a permanently and definitely located structure or any choice of structure used as a residence that was not subject to change or fluctuation. 130 Wn. App. at 765. Having failed to make his house payments, Mr. Stratton was forced to vacate the home he had registered as his fixed residence. He turned the keys over to the realtor and was

sleeping in his car in the driveway of his registered address. In *Stratton*, we stated:

The purpose of the sex offender registration statute is to assist law enforcement agencies' efforts to protect their communities against sex offenders who re-offend. *State v. Pray*, 96 Wn. App. 25, 28, 980 P.2d 240 (1999) (citing Laws of 1990, ch. 3, § 401). Specifically, registration provides law enforcement agencies with an address where they can *contact* a sex offender. *Pray*, 96 Wn. App. at 28-29 (emphasis added). The sheriff could have contacted Stratton at the 121 Beacon Hill Drive address by mail, by phone, or in person in the evenings.

130 Wn. App. at 765.

Like Stratton, Furtwangler was lawfully living in his girl friend's home at the time he registered it as his "fixed residence" in July 2004. He registered the South Alder address as his residence again in May 2007. Although he was violating a restraining order by being at the South Alder house,<sup>4</sup> the permanent residents allowed him to use their home as a mailing address, store all his personal belongings in the house, and keep food in their refrigerator and in a special cabinet in the mud room/rear porch of the house. According to the evidence in the record, Furtwangler ate his meals, visited his girl friend, and took naps during the daytime hours in the mud room of the South Alder home. Although Furtwangler was coming and going from the South Alder address on a more limited basis than in July 2004, when he first registered that address as his "fixed residence," the evidence does not support the trial court's conclusion that he had another residence. Nor is the evidence sufficient to prove beyond a reasonable doubt that South Alder was not still Furtwangler's residence in May 2007. Moreover, the State failed to provide sufficient evidence to prove beyond a reasonable doubt that on or about September 27, 2007, Furtwangler was transient and required to comply with the requirements set out in RCW

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<sup>4</sup> The State did not charge Furtwangler with violating a restraining order. Former RCW 26.50.110 (2007).

9A.44.130(6).

Like *Stratton*, the record here shows that the sheriff could have contacted Furtwangler by mail or in person during the morning daytime hours in the mud room of the address shown on his registration form on file. Furtwangler intended to and did return to the South Alder address daily and it remained the place where he received his mail, ate his meals, and slept.<sup>5</sup> Despite Tina's parents' wishes to the contrary, Furtwangler had not changed his residence and, as late as October 2007 (after the charging period), had stated he did not intend to change it. Accordingly, because the State failed to provide evidence sufficient to prove beyond a reasonable doubt that on or about September 27, 2007, Furtwangler was transient and required to register as a sex offender who had no fixed residence and comply with the weekly reporting requirements of RCW 9A.44.130(6), we reverse Furtwangler's conviction and dismiss the charge with prejudice.<sup>6</sup>

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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QUINN-BRINTNALL, J.

We concur:

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<sup>5</sup> The evidence showed that Furtwangler slept in the home's mud room for a few hours each day but left the residence at night and when Tina's parents were present.

<sup>6</sup> Although our resolution of Furtwangler's sufficiency of the evidence challenge eliminates the need to address his challenge to the propriety of the sentence imposed, we note that our Supreme Court rejected an identical argument in *State v. Brooks*, 166 Wn.2d 664, 672-73, 211 P.3d 1023 (2009).

No. 38189-3-II

ARMSTRONG, J.

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VAN DEREN, C.J.